IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	**Case No. 99-41791**
DEVA CASE and KEITH CASE,	)	
	)	**MEMORANDUM OF DECISION**
Debtors.	)	
_____	)	

Matthew Cleverley, Idaho Falls, Idaho, for Debtors.

Craig Simpson, Idaho Falls, Idaho, for Westmark Credit Union.

L. D. Fitzgerald, Pocatello, Idaho, Trustee.

I. Background

This Chapter 13 case is before the Court to consider confirmation of Debtors' proposed plan and Westmark Credit Union's ("Westmark") Objection to that plan. Also considered is Westmark's Motion for Relief from Automatic Stay. A combined evidentiary hearing was conducted on February 22, 2000, after which the issues were taken under advisement. After consideration of the evidence, testimony and arguments by the parties, this Memorandum constitutes the Court's findings of fact and conclusions of law. Fed. R. Bankr. P. 7052.

II. Facts

Debtors Deva Lynn and Keith Wade Case ("Debtors") filed for relief under Chapter 13 of the Bankruptcy Code on October 29, 1999. Westmark was scheduled by Debtors as a secured creditor for a loan taken on October 29, 1997, in the amount of $5,842.35. The collateral for the loan was a 1998 Polaris snowmobile. In their initial Chapter 13 plan, Debtors proposed to pay Westmark $3,400 plus eight percent interest as a secured creditor. At a hearing on December 28, 1999, however, Westmark was granted relief from the automatic stay regarding the snowmobile, and Debtors' plan was orally modified to provide for surrender of their interest in the snowmobile to Westmark.

Shorty thereafter, Westmark discovered Debtors were no longer in possession of the snowmobile. It seems that on September 13, 1998, Debtors traded the snowmobile and a trailer to Richard Ramirez as a down payment on their purchase of a truck from Ramirez. The purchase contract provided that when Debtors received clear title to the snowmobile, Debtors would transfer the title to Mr. Ramirez. Mrs. Case testified this provision of the contract was included because, under the parties' agreement, she and her husband intended to continue paying the Westmark loan until they paid off the snowmobile. The contract also provided that if the snowmobile and trailer were ever repossessed,

Debtors would owe Mr. Ramirez an additional $6,000 plus fifteen percent interest, to be paid at $550 per month. Debtors did not obtain permission from Westmark to transfer the snowmobile, nor was Westmark informed of their agreement with Ramirez. Debtors also did not list this potential debt to Ramirez in their bankruptcy schedules, nor did they give him notice of the bankruptcy filing. In the meantime, according to Mrs. Case, Ramirez has taken the snowmobile and is somewhere in Brazil. Debtors have made limited and unsuccessful efforts to locate him or the snowmobile.

Westmark objects to confirmation of Debtors' proposed plan because Debtors no longer have the ability to physically surrender the snowmobile to the creditor. The Chapter 13 Trustee L.D. Fitzgerald ("Trustee") agrees the plan should not be confirmed as proposed. Debtors argue that a physical surrender of the snowmobile is not required by the Bankruptcy Code and that surrendering their "interest" in the snowmobile is legally sufficient.

In addition, Westmark also holds a second note from Debtors secured by deed of trust on Debtors' home. While Debtors are technically current on this loan, historically they have been from a few days to a couple of weeks late on the monthly payments. Debtors propose in their plan to pay Westmark directly on this loan without modification to the contract. Westmark

seeks relief from the automatic stay arguing that if Debtors continue their pattern of late payments "outside" the plan, Westmark should be free to foreclose. Debtors and Trustee resist the requested stay relief, arguing Debtors' home is essential for their reorganization.

III. Discussion

A. "Surrender" of Property Under Section 1325(a)(5)(C)

Under the confirmation standards in the Bankruptcy Code for a Chapter 13 plan, an allowed secured claim must be addressed in one of three ways. First, a secured creditor can simply consent to the proposed plan treatment. 11 U.S.C. § § 1325(a)(5)(A). If the secured creditor does not accept the proposed treatment, a plan can still be confirmed. The debtor may propose that the secured creditor retain its lien and receive the present value of its allowed secured claim over the life of the plan. 11 U.S.C. § § 1325(a)(5)(B)(i)-(ii). Alternatively, the plan can be confirmed if "the debtor surrenders the property securing such claim to such holder." 11 U.S.C. § 1325(a)(5)(C). Debtors propose this third approach for treatment of Westmark's claim secured by the snowmobile. They argue the term "surrender," as used in the Code, should be interpreted to permit them to surrender their "interest" in the collateral,

whatever that interest might be. Westmark, understandably, objects. It contends the correct interpretation of Section 1325(a)(5)(C) requires Debtors to physically surrender the snowmobile to the credit union, so it can be sold and the proceeds applied to its loan balance.

The term "surrender" is not defined in the Code, nor has this Court issued any decisions on this point. However, other courts have dealt with the issue, and those opinions lend guidance here:

> The Code nowhere defines or elaborates on the meaning of "surrender" as it is used in Chapter 13. Its use in § 1325(a)(5) refers to the surrender of property securing a claim *to the holder of that claim*. Thus, it would clearly appear that Congress contemplated the term to mean the return and relinquishing of possession or control to the holder of a claim.

In re Robertson, 72 B.R. 2, 4 (Bankr. D. Colo. 1985) (emphasis added). In *Robertson*, the debtor and his former wife divorced, the parties' car was awarded to the wife, and the debtor was ordered to pay the debt secured by the car. The former wife then "departed for parts unknown" with the car. *Id.* at 3. In his Chapter 13 plan, however, the debtor attempted to "surrender" the vehicle to the creditor, which the court did not allow. The court stated, "[t]he debtor is attempting to 'abandon' an interest which has already been taken from him by the state court, and hoping this court will deem that to constitute his 'surrender'

under § 1325(a)(5)(C). I do not believe that is sufficient under the Code." *Id.* at 4.

In a similar case, a debtor retained her automobile under her Chapter 13 plan, and proposed payment to the holder of the secured claim. *Hospital Authority Credit Union v. Smith (In re Smith)* 207 B.R. 26, 28 (Bankr. N.D. Ga. 1997). Shortly after confirmation, though, the debtor encountered mechanical problems with the car. She took it to a mechanic for repairs, but then determined she could not pay for the repairs. She then requested to modify her plan to "surrender" all her right, title, and interest in the car to the creditor. *Id.* at 28-29. In the meantime, the mechanic asserted a possessory lien against the auto for his bill. *Id.* at 29. In refusing to approve the proposed modification, the bankruptcy court observed that "[m]erely telling the creditor where it can find the collateral is not a surrender 'to such holder.'" The court concluded that "[t]he Debtor does not have the collateral to surrender." *Id.* at 28.

Here, Debtors purposefully converted the snowmobile by trading it to Ramirez as a part of the truck purchase transaction. Debtors do not have possession of the snowmobile nor does it appear they have any remaining legal interest in the snowmobile. Moreover, they insist they do not know the present whereabouts of either Ramirez or of Westmark's collateral, and they have

essentially taken no constructive steps to assist Westmark in locating either, other than providing Westmark with Ramirez' former address.

Under these facts, the Court declines to adopt Debtors' argument that they have effected an appropriate "surrender" of Westmark's security as that term is used in Section 1325(a)(5)(C). To simply surrender whatever "interest" they have in the snowmobile, when according to their contract with Ramirez they likely have none, is of no help to Westmark. Westmark bargained for repayment of its loan, or in the event of a default, the right to take possession of and sell the snowmobile. Chapter 13 contemplates that, unless a secured creditor agrees to accept less, it is entitled to payment of the present value of the collateral, or to reclaim its collateral. Under Debtors' proposed plan, Westmark effectively gets neither. As in *Robertson* and *Smith*, Debtors have nothing left to surrender. Debtors' plan therefore cannot be confirmed.[1]

[1] By its analysis, the Court does not imply that a Chapter 13 plan can never be confirmed where a debtor proposes to surrender collateral to a secured creditor that has, prior to bankruptcy, been converted or transferred. Nor does the Court hold that a surrender must under all facts be accompanied by the actual transfer of physical possession of the property to the creditor. Whether the proposed treatment of the secured creditor's claim in a plan amounts to an effective "surrender" for purposes of Section 1325(a)(5)(C) must be measured against the facts of each case.

B. Good Faith Under Section 1325(a)(3)

There is an alternative basis for denying confirmation in this case. The Court concludes Debtors' plan was not proposed in good faith.

Section 1325(a)(3) allows for confirmation only if "the plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. 1325(a)(3). Good faith is not defined in the Code. In determining whether good faith exists, the Court "must consider the totality of the circumstances, including pre-petition conduct, in deciding whether the debtor has 'acted equitably.'" *In re Messinger*, 241 B.R. 697, 701 (Bankr. D. Idaho 1999) (quoting *In re Tucker*, 989 F.2d 328, 330 (9th Cir. 1993)). Factors indicative of bad faith include proposing a plan in an inequitable manner; misrepresenting facts in the plan; and attempting to unfairly manipulate the Bankruptcy Code. *Id.* (citing *In re Goeb*, 675 F.2d 1386, 1390 (9th Cir. 1993)).

Here, Debtors' bankruptcy schedules listed the snowmobile as an asset, when they knew they did not have possession of, nor even any remaining legal rights in the item. Ramirez was not identified as a creditor, nor was the transfer of the snowmobile to Ramirez disclosed. It was not until Westmark discovered Debtors did not have possession of the snowmobile that they revealed the transaction with Ramirez. While the Court does not believe

Debtors acted with evil intent in transferring the snowmobile, their handling of the transaction coupled with a failure to disclose it to Westmark or the Trustee was a serious omission that has left Westmark without effective means of protecting its interests in its collateral. In her testimony, Mrs. Case acknowledged the contract with Ramirez was not revealed in their schedules because, although they wanted to repay the Westmark debt, they also wanted to shield Ramirez from repossession of the snowmobile. In sum, Debtors' proposed treatment of Westmark's secured claim in this case is simply inequitable, and this Court should not allow such an attempted manipulation of the Bankruptcy Code.

C. Stay Relief

In addition to objecting to the proposed treatment of the snowmobile debt, Westmark requests relief from the automatic stay provisions of Section 362 regarding Debtors' home. Westmark holds a note for approximately $51,000 secured by a first deed of trust on the home. The home was appraised in 1996 for $63,000, and is listed on Schedule A as having a current market value of $78,000. Debtors propose payments on the trust deed outside the Chapter 13 plan, yet their payments which are due on the 1st of each month have been repeatedly paid somewhere between the 15th and 20th of each month

for several months. Mrs. Case testified that payments after the first of each month would also likely continue in the future given the nature of the Debtors' income from their trucking business. Westmark requests stay relief because of these untimely payments and because Debtors have no equity in the property.

Section 1322(b)(2) and (5) prohibit the modification of the rights of a holder of a secured claim secured only by a security interest in the debtor's principle residence in a Chapter 13 plan, other than through curing an existing default through the plan. Debtors' plan, by proposing payment to Westmark directly according to the terms of their contract, acknowledges this limitation.

While it appears that the value of Debtors' home is more than adequate to protect Westmark's secured position, Debtors must live up to their contractual obligations to the creditor or Westmark should be allowed to foreclose. Because of this, there is no legitimate reason the automatic stay should continue as to this particular loan.

IV. Conclusion

For the foregoing reasons, confirmation of Debtors' Chapter 13 plan must be denied. While it is doubtful that Debtors could propose a plan that Westmark would accept, they will be given a brief opportunity to negotiate with

the creditor, and to propose a further amended plan. If no confirmable amended plan is proposed, the case will be dismissed. 11 U.S.C. §§ 1307(c)(1), (5). Westmark's motion for relief from stay as to the house loan will be granted. A separate order will be entered by the Court.

DATED This _____ day of March, 2000.

_____
JIM D. PAPPAS
CHIEF U.S. BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a true copy of the document to which this certificate is attached, to the following named person(s) at the following address(es), on the date shown below:

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CASE NO.: 99-41791

CAMERON S. BURKE, CLERK
U.S. BANKRUPTCY COURT

DATED:

By_____
Deputy Clerk